

OCA 87-2265
INFO

OFFICE OF CONGRESSIONAL AFFAIRS

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	ACTION	INFO
1. D/OCA		
2. DD/Legislation		X
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Remarks:

cmc 28 May 87

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OPA FILE *Legislation*

U.S. Department of Justice

REPT # *Record*

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

O/CONGRESSIONAL AFFAIRS

87-2265

20 MAY 1987

The Honorable James C. Miller, III
Director, Office of Management and Budget
Washington, D.C. 20503

Re: Section 404 of the draft Intelligence
Authorization Bill for FY 1988

Dear Dr. Miller:

The Department of Justice strongly supports the concept of exempting from judicial review all determinations by agency heads regarding access to classified information. However, because we have a petition for a writ of certiorari on this issue currently pending, we recommend against submitting Section 404 of the draft Intelligence Authorization Bill for FY 1988 at this time.

The CIA's draft proposal appropriately seeks to exempt from review all determinations regarding access to classified information made by the heads of executive branch agencies as defined in 5 U.S.C. 552(e). The exemption would thus apply to all access determinations, for both government employees and others. Further, we believe that the attempt to provide a complete exemption from review on any basis, including constitutional questions, by any court or administrative agency, is constitutional. See the government's petition for a writ of certiorari in Gates v. Doe, No. 86-1294, pp. 22-25.

However, we recommend against proposing legislation on this issue at the present time, because we are currently seeking Supreme Court review on the same issue in No. 86-1552, Department of the Navy v. Egan. The question in Egan is one of statutory interpretation. If Congress were to consider and reject an explicit statutory exemption from review while Egan is pending, it would seriously undercut our argument. If certiorari is not granted in Egan,¹ or if the Supreme Court rejects our position, we would then enthusiastically support the CIA's attempt to obtain an explicit legislative exemption from review.

¹ We expect to learn on May 26 whether the Supreme Court will hear Egan.

There appears to be a problem with the section as drafted, however. By providing that "the agency head's certification, and any action taken by the agency head pursuant thereto, shall be final and conclusive . . ." the section could be read to seek to exempt from review personnel actions taken as a result of the access determination, rather than simply exempting the access determinations from review. To exempt from review personnel actions taken as a result of a change in an employee's access to classified information would be a major change in civil service law. As it does not appear from the section by section analysis and explanation that the proposed section 404 is seeking such a sweeping change in federal personnel law, but instead is seeking to immunize from review only those actions directly related to access determinations, such as revocation of security clearance, the language should be revised to so reflect. Accordingly, we would suggest that the language be revised to read "the agency head's certification, and any action taken by the agency head pursuant thereto to deny, revoke, or limit access to such classified information, shall be final and conclusive . . ."

In sum, although the Department of Justice supports the concept embodied in Section 404, we recommend against proposing legislation on the subject until after the Supreme Court has taken final action in Department of the Navy v. Egan.

Sincerely yours,



JOHN R. BOLTON

Assistant Attorney General